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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1984

MARJORIE H. ROWLAND

Petitioner,

vs.

MAD RIVER LOCAL SCHOOL DISTRICT,
MONTGOMERY COUNTY, OHIO
A PUBLIC BODY CORPORATE

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Sixth Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

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A. Whether the Decision Of The Court of Appeals Conflicts With Applicable Decisions Of This Court Regarding Whether Petitioner's Speech Involved Matters Of Public Concern

B. Whether the Decision Of The Court Of Appeals Conflicts With Applicable Decisions Of This Court Regarding Whether Respondent's Employees Violated Petitioner's Right To Equal Protection

C. Whether the Decision Of The Sixth Circuit Conflicts With Applicable Decisions Of This Court Regarding The "But For" Standard of Mt. Healthy v. Doyle

D. Whether the Sixth Circuit Decision Conflicts With Applicable Decisions Of This Court, Or Decisions Of Other Federal Courts Of Appeal, Regarding The Liability of Government Employers For Unconstitutional Acts Committed By Key Decision Makers Who Were In The Process of Carrying Out Official Policies

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II. STATEMENT OF THE CASE

Plaintiff-Petitioner, Rowland (hereinafter "Petitioner"), began working for Defendant-Respondent, Mad River Local School District, Board of Education (hereinafter "Respondent") as a guidance counselor in the vocational education department at Stebbins High School in Dayton, Ohio, in August, 1974, (Tr. II, 289). Petitioner was employed under a one year limited contract that would expire at the end of the school year (Tr. II, 476-477). Petitioner's office was located within the vocational education department and Petitioner jointly shared with other staff members of the department a secretary by the name of Elaine Monell (Tr. II, 308; Tr. III, 381).

In October or November, 1974, Petitioner had a discussion with Monell wherein Petitioner named one of her student counselees as being gay (Tr. II, 314, 320; Tr. III, 406-410). On November 26, 1974, Monell was working at her desk, typing, when Petitioner approached her and told her that she was bisexual and had a female lover. Petitioner also identified by name a second student counselee who was homosexual. Monell was upset, did not want to be confronted with that information, and, according to Petitioner, Monell became cold and distant. Monell told the department supervisor about her conversation with Petitioner. On the following day, Monell talked with the school principal, Defendant, DiNino, about the same situation (Tr. II, 176, 409-411, 419; Tr. III, 390-391, 490-492; Tr. IV, 132).

During this same time period, and in the vocational education office, Petitioner had a confrontation with a parent and student counselee because Petitioner had told the student it was okay to be gay. The parent was upset with Petitioner and told Petitioner that it was not okay,

that it was wrong, against the bible, and asked Petitioner why she told the student that it was okay (Tr. II, 321, 328-330, 495-496, 507-508). In addition, Petitioner told the assistant principal of the school, Goheen, and several teachers who were personal friends that she was bisexual.

In December, Petitioner had a meeting with DiNino, and he suggested that she resign. Petitioner refused to resign, and then told several other Stebbins teachers that she had been asked to resign because she was bisexual, and Petitioner solicited their support (Tr. II, 338-350).

DiNino then reported his conversations with Petitioner to Defendant, Hopper, the local school district superintendent. Shortly thereafter, Hopper informed some members of the Respondent simply that Hopper had some type of problem in the high school and would have to take some action or discipline a faculty member. Hopper did not say that he was going to suspend or remove the faculty member (Tr. II, 69, 89-98, 210, 222-223; Tr. III, 5-6, 566-571). A few days later, Petitioner, with her attorney, met with DiNino, Hopper, and the School District's attorney, and again Petitioner refused to resign. Thereupon, at the decision of Hopper, Petitioner was suspended with full pay for the remainder of her contract (Tr. II, 72-74, 109-112, 143-144, 342-344).

Petitioner then filed the first of two actions in District Court. The District Court entered a preliminary injunction against the suspension and thereafter, Hopper reassigned Petitioner to a position involving development of a career education curriculum. This was a position with no student contact (Tr. II, 184-185, 223; Tr. III, 642-643). As was the case with the suspension, the decision to transfer Petitioner was made by Hopper. That is, the members of the Respondent Board of Education were informed by

Hopper of the transfer after it was an accomplished fact; Hopper gave the members of the Board no reason for the transfer other than that it was his right, authority and prerogative; and the Respondent Board took no action whatsoever (Tr. II, 98, 227; Tr. III, 9-13, 643).

In March, 1975, DiNino recommended to Hopper that the contract of Petitioner, along with the contract of several other Stebbins teachers not be renewed. The local superintendent, Hopper, concurred, and, in turn, recommended to the county superintendent, Crim (who was not made a party to any action), that Petitioner's contract, and the contracts of several other Stebbins teachers, not be renewed. Petitioner was informed of the recommendation and, at a regular meeting of the school board, the Respondent, Board of Education, received from Crim and Hopper a recommendation to not renew the contracts of several Stebbins teachers, including the contract of Petitioner, and no reasons for the recommendation were given. At that meeting of the Respondent, Board of Education, the recommendation to not renew the contracts of employment was unanimously adopted without independent investigation (Tr. II, 96-97, 208, 217, 220; Tr. III, 13-14, 516, 589, 645-646).

Petitioner filed a second action in the District Court charging that the reassignment and failure to renew her contract violated a number of constitutional rights. The Defendants in both actions were the Respondent, Board of Education, the president and members of the Board, the local superintendent of the school district, and the principal of Stebbins High School. A jury trial was conducted by a U.S. Magistrate, but the jury's role was limited to responding to special verdict questions submitted to it by the Magistrate. In Special Verdicts I, II and III, the jury found that Petitioner's statement to Monell

that she was bisexual and had a female lover and Petitioner's statements to Goheen and fellow teachers regarding her bisexuality, did not interfere with the proper performance of Petitioner's duties, Monell's duties, the teachers' duties, or with the regular operation of the school generally (A-22a-27a). In Special Verdict V, the jury found that Hopper and DiNino treated Petitioner differently than similarly situated employees because Petitioner was homosexual/bisexual; however, the Respondent, Board of Education, did not treat Petitioner differently (A-28a). In Special Verdict VII, the jury found that the Respondent, Board of Education, when it voted to non-renew Petitioner's contract, did not act for any reason other than the recommendation of Hopper (A-31a). In Special Verdict V, the jury also found that Petitioner was not performing her job in a satisfactory manner at the time of her suspension because she revealed the sexual orientation of two students when it was not necessary to do so (A-29a, 32a).

On the basis of the jury's answers to the Special Verdicts, the Magistrate dismissed all defendants from the action except Respondent, Board of Education. The Magistrate entered orders finding the Respondent, Board, liable for violations of Petitioner's rights of free speech and equal protection under the United States Constitution and judgment was entered in the amount of $55,-973.14. Although Petitioner had requested reinstatement and the expungement of the Respondent's records regarding numerous deficiencies and complaints about Petitioner's job performance (in addition to the disclosure of the sexual orientation of two students), the Magistrate refused to order such relief. The Magistrate found that the evidence introduced at trial substantiated the accuracy of the Respondent's records and further established

that Petitioner was unwilling to follow the policies and directives of school administrators. (Order regarding Plaintiff's request for prejudgment interest, etc., p. 6-7, R. 82).

III. ARGUMENT

A. The Decision Of The Court Of Appeals Does Not Conflict With Applicable Decisions Of This Court Regarding Whether Petitioner's Speech Involved Matters Of Public Concern

While Petitioner did, in fact, do some speaking to Monell, Goheen, and other employees at Stebbins High School, Petitioner's speaking was not the type of speech contemplated by *Connick* v. *Myers*, ____ U.S. ____, 103 S.Ct. 1684 (1983); *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979); *Mt. Healthy City School District, Board of Education* v. *Doyle*, 429 U.S. 274 (1977); *Perry* v. *Sinderman*, 408 U.S. 593 (1972); and *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). In *Givhan*, supra, at 414, this Court approvingly discussed *Pickering*, supra, and noted the standard to be applied in evaluating the speech of a public employee:

> "In determining whether a government employee's speech is constitutionally protected, the interests of the [employee], as a citizen, in commenting upon matters of public concern must be balanced against the interests of the state, as an employer, in promoting the efficiency of the public services it performs through its employees."

All of the above cases involved comments being made upon public issues and matters of public concern—not comments upon matters which were entirely personal to the speaker and not at all relevant to any matter of public

concern or controversy and not at all relevant to any educational purpose.

In *Connick* v. *Myers*, supra, this Court discussed the importance of first determining whether or not the speech involved matters of public concern. The opinion in *Connick* v. *Myers*, supra, at 1689 noted that, if a public employee's statements cannot be fairly characterized as constituting speech on a matter of public concern, then it is unnecessary for the courts to scrutinize the reasons for discharge. Thus, if the "speech" does not involve matters of public concern, there is no need to engage in a *Pickering* type of analysis. The essence of the Court's holding appears at 1690 of the opinion:

> "We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."

Furthermore, this Court's opinion in *Connick*, at 1690, specifically set forth the criteria to be used by the courts in determining the public or private nature of an employee's speech:

> "Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement as revealed by the whole record."

An examination of the opinion of the Sixth Circuit in the case at bar, *Rowland* v. *Mad River Local School District*, 730 F.2d 444, at 449 (6th Circuit, 1984), demonstrates that, in fact, the *Connick* criteria was followed and the

Sixth Circuit determined that Petitioner's statements did not address matters of public concern. As noted by the Sixth Circuit, Petitioner's speech involved only her own personal interests and there was no evidence of any public concern in the community or at Stebbins High School regarding the issue of bisexuality among school personnel when Petitioner began speaking to others about her own sexual preferences.

While Petitioner now claims that the Sixth Circuit's analysis is incorrect and that her speech did involve a matter of public concern, even the Magistrate at the trial level indicated otherwise. At the trial level, the Magistrate ruled from the bench regarding liability on the First Amendment and found as follows:

> "In this case, we don't have the advocacy of ideas in a public forum. We have the private statement of personal feelings by one individual to another in the employment setting." (Tr. IV, 422-423).

At page 6 of her Petition, Petitioner argues that the Sixth Circuit ignored this Court's decision in *Givhan* v. *Western Line Consolidated School District* , supra, as distinguished by this Court in *Connick*, supra, at 1691, n.8. However, Petitioner's reference to the footnote in *Connick* does not assist her cause. As noted in that footnote, *Givhan* was a case where an employee was speaking out on matters of general concern, not on matters regarding a personal employment dispute. Furthermore, to paraphrase and adapt portions of that footnote to this case, it can be said that Petitioner's statements not otherwise of public concern do not attain that status because the subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest. Petitioner's analysis of whether her statements if characterized as protests, etc., could be

matters of public concern is beside the point—it does not answer whether the statements involved in this particular case constituted such speech. Contrary to the contentions of Petitioner, her statements were not aimed at social and legal change—rather they were simply aimed at various school employees with the hope that the conversations would remain confidential (hardly a method to initiate social and legal change).

The essence of Petitioner's argument regarding whether her statements constituted speech involving a matter of public concern is found at pages 10 and 11 of the Petition. Therein, Petitioner asserts that this Court should grant *certiorari* in order to provide guidelines on what constitutes matters of public concern. However, this Court has already set forth those guidelines—they are contained within the *Connick* opinion at 1689-1690. Certainly, this is not an issue which deserves further elucidation by this Court. Petitioner does not complain that the Sixth Circuit applied the wrong test; Petitioner merely complains that the application of that test to the facts of this case result in a determination that Petitioner's statements do not happen to constitute speech involving matters of public concern. Such contention should not form the basis for granting a writ of *certiorari*.

B. The Decision Of The Court Of Appeals Does Not Conflict With Applicable Decisions Of This Court Regarding Whether Respondent's Employees Violated Petitioner's Right To Equal Protection

1. The decision of the Sixth Circuit did not fail to apply the "clearly erroneous" rule in determining that Petitioner was not treated differently than similarly situated employees.

At trial, the Magistrate correctly observed that there was absolutely no evidence in the record to support an equal protection claim (Tr. III, 620), and that there was

absolutely no evidence of any similarly situated employees having a work record comparable to that of the Petitioner (Tr. IV, 352-353). It is a fact that one can search in vain for any evidence in the record in this case regarding any employee who had a work record comparable to that of the Petitioner. Thus, it was improper for the Magistrate to submit such issue to the jury for speculation.

The Sixth Circuit, having the entire record before it, agreed with the Magistrate's analysis regarding the lack of evidence. The Sixth Circuit in *Rowland* v. *Mad River Local School District*, supra, at 450 correctly observed that, at trial, the Magistrate "required the jury to make findings on an issue which he recognized as having been the subject of no proof. This was plain error. Since Plaintiff failed to produce any proof that she was treated differently from other similarly situated employees, there was nothing to submit to the jury on this issue."

Petitioner, at page 15 of the Petition, argues that the Sixth Circuit could not have applied the "clearly erroneous" standard and at the same time concluded that there was no appropriate evidence on the issue because the transcript is replete with testimony regarding the concerns of Hopper and DiNino regarding Petitioner's homosexuality. Petitioner, in her brief, then proceeds to refer the Court to various portions in the transcript where her homosexuality was discussed.

Nevertheless, that does not supply the evidence which the Magistrate and the Sixth Circuit found lacking. For example, the references to the transcript made by Petitioner in her brief are taken out of context and certainly cannot be considered a representation of "the totality of the evidence" for purposes of the clearly erroneous rule. In fact, the totality of the evidence indicates that the concerns regarding Petitioner's homosexuality were al-

ways in conjunction with Petitioner's numerous job deficiencies. For example, the evidence in the case at bar established that Petitioner had received several oral and written reprimands from the vocational education department supervisor regarding numerous shortcomings and deficiencies in Petitioner's performance—most of which took place before anyone had knowledge that Petitioner was bisexual/homosexual (Tr. III, 352-377; Ex. C.). As noted above, the Magistrate, after finding Respondent, Board of Education, liable to Petitioner for constitutional violations, nevertheless declined to expunge the Respondent's records regarding the numerous deficiencies and shortcomings in Petitioner's job performance because those records were, in fact, supported by the evidence at trial. In addition, of course, the jury indicated that Petitioner was not performing her job in a satisfactory manner in that she had breached her obligation of confidentiality toward her student counselees. Petitioner herself recognized that her student counselees deserved an absolutely confidential situation (Tr. II, 299-300). Indeed, her position as guidance counselor was such that the maintenance of confidentiality was absolutely crucial to her utility, future functioning, and effectiveness (Tr. III, 200, 219). Certainly, an examination of the record in this case clearly demonstrates that there was absolutely no evidence of any employee "similarly situated" to Plaintiff regarding job performance.

It is particularly significant to note that the Magistrate, at trial, observed:

> "I think that in order to prove discrimination, the Plaintiff has to prove that she was performing her job properly and then was fired or action was taken for no apparent legitimate reason.
>
> If you fail to prove that you are performing your job properly, I don't think you have made a *prima facie* case of discrimination." (Tr. IV, 203).

There can be no doubt that Petitioner did not perform her job properly. Such was the finding of the jury and the Magistrate.

Petitioner's arguments would lead one to believe that the decision of the Sixth Circuit regarding the discrimination issue in this case was an aberration. However, that is not the case. The Sixth Circuit accurately summarized Petitioner's evidence on her equal protection claim, as well as the basis for its holding as follows:

> "[As] we have pointed out, the Plaintiff sought to prevail on her equal protection claim without any showing that heterosexual school employees in situations similar to hers have been, or would be, treated differently for making their personal sexual preferences the topic of comment and discussion in the high school community. Again, this is nothing more than the required analysis of an equal protection claim." *Rowland* v. *Mad River Local School District*, supra, at 451-452.

2. The decision of the Sixth Circuit does not involve the ability of a party to prove discriminatory motive by direct evidence, and therefore certiorari should not be granted on an issue not passed upon by the Court below.

In light of the foregoing, Petitioner's arguments regarding direct evidence of discriminatory motive (see Petition, pages 16-19) are simply irrelevant. For example, assuming *arguendo* discriminatory motive can be established by direct evidence, as well as circumstantial evidence, that does not necessarily establish that discrimination did in fact take place. An employer might have all the desire in the world to engage in discrimination, but if in actuality all his employees are paid the same and otherwise subjected to the same working conditions, no claim of discrimination can be maintained.

The foregoing demonstrates the essential failure of Petitioner's argument on this issue: case precedents which set forth a method of proving discriminatory motive merely set forth a method of proving one element of a discrimination case, i.e. motive; however, proof of discriminatory motive does not prove an entire case of discrimination. Thus, the Court should refrain from granting *certiorari* in order to "reaffirm" a doctrine that discriminatory motive can be established by direct as well as circumstantial evidence.

Most Certainly, this Court should refrain from granting *certiorari* to "reaffirm" a doctrine that discriminatory motive can be proved by direct evidence when the Sixth Circuit has done nothing to impair such a doctrine.

3. The Sixth Circuit, in its decision below, did not pass upon the issue of whether or not homosexuals/bisexuals are protected by the equal protection provisions of the Fourteenth Amendment, and therefore certiorari should not be granted for such an issue.

Similarly, it is respectfully submitted that this Court should not grant *certiorari* simply in order to decide whether or not homosexuals/bisexuals are protected by the equal protection provisions of the Fourteenth Amendment. The opinion of the Sixth Circuit in this case has not ruled on whether or not homosexuals/bisexuals are protected by the equal protection provisions of the Fourteenth Amendment. Thus, there is really nothing for this Court to review on that issue. In fact, it is somewhat surprising that Petitioner wishes the Court to grant certiorari on this issue when, in her brief before the Sixth Circuit, Petitioner repeatedly stated that the evidence established that the suspension, reassignment and nonrenewal were caused by Petitioner's speech and not her

sexual preference, and indicated that the Sixth Circuit need not address the issue of whether or not sexual preference is constitutionally protected:

> "[P]laintiff's exercise of her right to free speech in [the circumstances of this case] cannot, consistent with the First Amendment, be the basis for [the school board's] actions. As plaintiff's speech was in fact the only reason for those actions, plaintiff is entitled to an affirmance of the District Court's judgment.
>
> ***The simple fact is that, as school officials unanimously testified below, [the school board's] actions were caused by plaintiff's speech and not by her sexual preference." (Brief of Plaintiff-Appellee, page 22, as filed with the Sixth Circuit).
>
> "Appellant, [the school board] *in the district court*, expressly disavowed plaintiff's sexual preference as a basis for its actions. ***There is therefore no reason for this Court to consider the purely hypothetical question of whether Appellant could have suspended, transferred or refused to renew Plaintiff purely because of her sexual preference." Id, p. 44.

Furthermore, Petitioner should not be permitted to assert that homosexuality is included within the right of privacy when, as the Sixth Circuit noted below, the case was submitted at trial on claims of free speech, equal protection, and access to the courts. Certainly, Petitioner should not be permitted to raise a new theory for the first time in this Court.

Finally, it is respectfully submitted that this Court has, by its previous rulings, provided sufficient direction regarding homosexual rights and the equal protection clause. E.g. *Doe* v. *Commonwealth's Atty.*, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd 425 U.S. 901 (1976), reh.den. 425 U.S. 985; *Baker* v. *Nelson*, 291 Minn. 310, 191 N.W.2d

185 (1972), appeal dismissed for want of a substantial federal question, 409 U.S. 810 (1972); also see, *Zablocki* v. *Redhail*, 434 U.S. 374, 398-399 (1978) (Powell, J., concurring in judgment); *Poe* v. *Ullman*, 367 U.S. 497, 546, 553 (1961) (*Harlan*, J., dissenting). As previously noted by this Court, the Fourteenth Amendment simply does not give federal courts the power to impose upon the states their version of what constitutes wise social policy. *Dandridge* v. *Williams*, 397 U.S. 471, at 485 (1970), reh. den. 398 U.S. 914.

C. The Decision Of The Sixth Circuit Does Not Conflict With Applicable Decisions Of This Court Regarding The "But For" Standard Of *Mt. Healthy* v. *Doyle*

It is respectfully submitted that *certiorari* should not be granted in order to determine whether or not the Sixth Circuit decision is in conflict with the "but for" standard set forth in *Mt. Healthy City School District, Board of Education* v. *Doyle*, supra. As the Sixth Circuit decision clearly indicates, its analysis on the "but for" test was not a determinative issue. That is, the Sixth Circuit merely indicated that "even if there were no other grounds for reversing the equal protection award, it would be necessary to remand for a proper *Mt. Healthy* determination." *Rowland* v. *Mad River Local School District*, supra, at 450. After making that observation, the Sixth Circuit went on to hold that, for reasons other than *Mt. Healthy* and the "but for" test, the judgment entered by the Magistrate would be reversed and the action against Respondent dismissed.

Furthermore, contrary to the assertions of the Petitioner, the Sixth Circuit decision does not conflict with this Court's holding in *Mt. Healthy*. To the contrary, the Sixth Circuit decision follows that holding. As the Sixth

Circuit noted, the Magistrate improperly omitted from Special Verdict VIII the matter of Petitioner's unsatisfactory job performance, and improperly combined in a single special verdict references to Petitioner's exercise of speech and sexual preference. Thus, the jury's response to Special Verdict VIII still made it impossible to tell whether or not the jury found that Petitioner was suspended and transferred for being bisexual or for talking about it. Thus, Respondent respectfully submits that it would be improvident for this Court to grant *certiorari* to "reaffirm" the holding in *Mt. Healthy* when the decision of the Sixth Circuit does not conflict with that holding.

D. The Sixth Circuit Decision Does Not Conflict With Applicable Decisions Of This Court, Or Decisions Of Other Federal Courts Of Appeal, Regarding The Liability Of Government Employers For Unconstitutional Acts Committed By Key Decision Makers Who Were In The Process Of Carrying Out Official Policies

Item F of Petitioner's questions presented for review and Petitioner's arguments in support thereof are patently misleading and inaccurate. Petitioner frames this issue as if it were established at trial that Hopper "was a policy making official and acted with the approval of the [Respondent] Board of Education". (See Petition, p. 26). That is, there is absolutely *no* evidence in the record that Hopper was a "policy maker". To the contrary, the only evidence on this issue was that the Respondent School Board itself makes policy and Hopper's job is simply to execute whatever that policy might be (Tr. III, 646-647). Furthermore, it can hardly be stated that Hopper was acting with the approval of the Respondent Board of Education, for the Magistrate indicated that "there is . . . uncontroverted testimony that the board members took

no action with respect to the suspension or the transfer" of Petitioner (Tr. III, 299).

Furthermore, the question, as framed by Petitioner, implies that Hopper was carrying out an official policy of the Respondent. However, during the jury instruction conference at trial, counsel for Respondent raised the issue of the failure of the Magistrate to submit to the jury any special verdicts or instructions in regard to the issue of whether or not any of the action of which Petitioner complained was taken in accordance with official or unofficial policy of the Respondent School Board. At that time, the Magistrate indicated that "its very clear" that there was no such policy (Tr. IV, 232-234). At no time did Petitioner object to the Magistrate's finding.

Contrary to the assertions of Petitioner, the decision of the Sixth Circuit is not in conflict with the decisions of this Court in *Monnell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978) and *Owen* v. *City of Independence, Mo.*, 445 U.S. 622 (1980). In her Petition, Petitioner completely misconstrues the holdings of this Court in *Monnell* and *Owen*. As noted in *Gilmer* v. *City of Atlanta*, 737 F.2d 894 (11th Circuit, 1984); *Magayanes* v. *City of Chicago*, 496 F. *Supp.* 812, 814 (N.D. Ill. 1980), *Owen* did not alter the basic requirement of *Monnell* that the plaintiff in a civil rights action, in order to recover against a governmental entity must establish that his injuries were the result of the execution of the government's policy or custom. Indeed, *Owen*, at 655 n.39 and at 657 reaffirmed *Monnell's* holding that a local government could not be held liable except where the government policy or custom causes the injury. In *Owen*, the governmental entity was held responsible, not on the basis of *respondeat superior*, but because in an official meeting of the city council, the council had voted on and issued

charges against a former police chief. The portion of the Court's opinion in *Owen*, upon which Petitioner apparently relies, is taken out of context. That is, the Court's discussion on decision makers (445 U.S. at 656) was contained in the Court's rationale for denying good faith immunity to local municipal corporations. Clearly, the Court was not saying that the acts of decision makers render the municipal corporation liable, irrespective of any governmental policy. Under the *Monnell* standard, the fact that a decision maker causes the injury is irrelevant unless that decision maker is executing a governmental policy or custom. To hold a governmental entity liable based solely on the fact that the injury was inflicted by a decision maker is not supported in logic or in law. That is, it is an established fact that no fictitious entity can act of its own force, it must have some employees. All those employees are, to a certain extent, vested with some power to make decisions. But this is not to say that every decision they make is in accordance with the employer's policy. Surely, if the decision maker makes a decision or takes an action contrary to established policy, then it is the decision maker and not the governmental policy that causes any injury. Similarly, if the decision maker acts upon a subject about which there is no governmental policy, any injury results from the act committed and cannot be causally related to any policy of the government. Thus, the term "decision maker" has little or no meaning—and no limitations—unless it is related to the meaning given by *Monnell*, i.e. one who *makes* government policy or custom, and, the policy having been made, is carried out and produces injury.

The evidence in this case establishes nothing more than that the local superintendent Hopper took some action which perhaps injured Petitioner. Unless Petitioner can

establish a policy or custom of the Respondent Board of Education to exclude homosexuals from employment or to discriminate against persons who exercise free speech, certainly there is no showing which satisfies *Monnell* and *Owen*. In the case at bar, on more than one occasion, the Magistrate indicated that whatever action may have been taken against Petitioner, it was not because there was a policy of Respondent to discriminate against either homosexuals or against people who exercise a right of speech (Tr. IV, 232-234, 399). Indeed, there was no evidence to support an equal protection claim in this case, and there was not even any evidence that a classification had been established (Tr. III, 620). The evidence merely shows that Hopper took some action based upon his own decision.

At page 28 of the Petition, Petitioner suggests that the decision of the Sixth Circuit is at odds with other Circuit Courts of Appeal which have decided whether or not governmental bodies are liable for unconstitutional acts committed by decision makers. *Key* v. *Rutherford*, 645 F.2d 880 (10th Circuit, 1981) and *Universal Amusement Co.* v. *Hofheinz*, 646 F.2d 996 (5th Circuit, 1981), are not relevant because they do not deal with the issue at all. Rather, they deal with the issue of the availability of the good faith defense to governmental bodies.

Similarly, the case of *Kingsville Independent School District* v. *Cooper*, 611 F.2d 1109 (5th Circuit, 1980) is not pertinent because that case involved action having been taken by the school district board of trustees itself—not some principal or superintendent or other administrative employee. The case of *Burt* v. *Abel*, 585 F.2d 613 (4th Circuit, 1978) must be questioned in light of other authorities and in light of the fact that the court's analysis on the issue is contained in a footnote, contains no citations of authority, and is quite brief. To the extent the case of

Williams v. *City of Valdosta*, 689 F.2d 964 (11th Circuit, 1982) would seem to support Petitioner's proposition, that case must be read in light of a later case from the same circuit, *Gilmer* v. *City of Atlanta*, supra, which indicates that a decision maker does not create liability upon the governmental body; liability, if any, is imposed upon the governmental body when custom has been *created or maintained* by law makers or persons whose edicts or acts may be fairly said to represent official policy—that an isolated incident does not constitute custom. Thus, the decision of the Sixth Circuit does not conflict with applicable decisions of this Court; nor does it conflict with decisions of other federal courts of appeal.

IV. CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully Submitted,

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